

**U.S. DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NORTHWEST, SUITE 400
WASHINGTON, DC 20001-8002**

DATE: 01/29/97

CASE NO. 95-INA-111

In the Matter of:

ST. GEORGE MEDICAL CENTER.
Employer

on behalf of

ATEF F. MIKHAEL
Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment in the United States is governed by §212 of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

In March 1993, the Employer, a Medical Center/Clinic, applied for certification to employ the Alien permanently as an Accountant with the following duties:

As Accountant, will be responsible for processing accounts payable and general ledger transactions, preparation of ADP payroll transactions for one hundred employees; reconciliation of all bank statements, accounts and prepare daily

deposits, reconciliation and processing of workers' compensation records, performs month-end closing, preparation of balance sheets, profit/loss statements, financial statements, and all tax returns for the center and its' various facilities. Responsible for supervision of other subordinate accounting personnel. Will utilize these duties with the use of computers and related software packages such as Microsoft, LOTUS 123, Excel123, Medisoft etc.

(AF 190).

The Employer noted at this time that it was requiring any U.S. applicant for the position to have a Bachelor of Science degree in Commerce or Accounting and 2 years experience in the job offered.

The CO issued his initial Notice of Findings (NOF) in this case in May 1993 in which he proposed to deny certification on the bases that the Bachelor degree requirement was excessive for the position of an Accountant and because he believed that the Alien did not have experience in the job offered. The Employer responded to this NOF with a 9 ½ page rebuttal in which it set forth its justification for the degree requirement and amplified upon the Alien's experience. This generated a supplemental NOF, issued in June 1993, in which the CO proposed again to deny certification. His reasons for doing so were that the Alien was not shown to have experience in all aspects of the "job offered" and the Employer had not indicated the willingness to accept applicants with experience in "related occupations." The CO objected also to the Employer's willingness to accept a Bachelor's degree in Commerce as such a degree is "not generally known to exist."

In lieu of rebutting the May 1993 NOF, the Employer chose to amend its application and re-advertise the position. Its new advertisement read as follows:

ACCOUNTANT for med. clinic, Huntington Park, AP/AR, GL, payroll, bank recon, balance sheets, P/L stmts, supervise 2 others, computer usage, MICROSOFT, lotus 123, EXCEL. B.S. Acctg or Bus. Related major & 2 yrs exp or 2 yrs related experience in acctg/finance. \$2700/mo....

The Employer received 14 responses to its new advertisement and filed a recruitment report on September 25, 1993, stating why each of these applicants had been rejected. In regard to applicant Al Nazif, the Employer reported that following his being interviewed it was determined that he did not have enough experience with the kinds of software they were using regularly such as Excel, Microsoft, and Medisoft, had no previous experience working in medical facilities, and had no experience involving medical billings. Another applicant, Magdy Guirguis, was said to have lacked the same experience and, based on his answers during the interview, appeared to have an "unstable personality."

On February 9, 1994, the CO again issued a NOF. The reason for his proposed denial at

this time was that on the basis of resumes, applicants Nazif and Guirguis appeared to meet the Employer's amended minimum requirements for the position and, therefore, had been rejected for other than lawful job-related reasons. The CO noted in this regard that the Employer had not included any special requirement for specific software knowledge or medical clinic experience in its application, as amended, and was no longer requiring 2 years experience only in the offered job. He stated that if the Employer had included such requirements, he would have required justification on the basis of business necessity.

In its rebuttal to the latest NOF, the Employer stated that after it had filed its recruitment report, it had received a letter from applicant Guirguis stating that he was not interested in the position. Appended thereto was a September 30, 1993, letter to the Employer's president, signed by Magdy Guirguis, in which he wrote:

I am writing this letter to thank you for the opportunity of interviewing me in your facility, and I would like to let you know that I am not interested in the position. The Huntington Park location was, in my opinion, an unsafe area. Second, I was unfamiliar with the type of computer software that you are utilizing in your offices, so this is not the proper position for me.

In regard to applicant Nazif, the Employer stated that although they had notified him at the time of his first interview, on September 15, 1993, that he was not qualified for the position, they interviewed him again on March 9, 1994. At the second interview Mr. Nazif advised the Employer that he was then receiving a salary of \$3,520.00 per month in his current position and would not consider their position unless the salary was equal to this amount. The Employer reported further:

During the course of this re-interview, we found that he is not familiar with computer programs such as Excel, Microsoft or Lotus 1.2.3. He stated to me that if we would offer a program of training for a certain period of time under supervision, that he may be able then to handle these programs. Again, please note that this is not a training position that we are offering at this time and do not have the time to train an employee to perform the duties of this position.

The CO issued a Final Determination on May 11, 1994 in which he denied certification on the basis that the Employer had not documented that the rejections of applicants Nazif and Guirguis were due to job related reasons. As a basis for this determination, the CO noted that in the original and first Supplemental NOFs, the Employer was provided the opportunity to rebut the finding that 2 years of experience in the exact job did not meet its minimum requirements but chose to amend the application to allow an alternative to two years in the job offered. The CO went on to state:

Whereas the item 13 job duties include Medisoft, excel (sic) and lotus (sic) only as examples of the type of software that is used, and the employer no longer requires

experience in the job offered, the attempt in the rebuttal to justify requiring specifically Medisoft, Excel and Lotus is too late. The employer did not list specific computer skills in item 15.

Moreover, additionally, Mr. Nasif (sic) did show Lotus and Excel as part of his software experience, and the employer has not persuasively documented how Mr. Nasif (sic) does lack experience with the item 13 job duties 'with the use of computers and software packages such as Microsoft, Lotus 123, Excel 123, Medisoft, etc.'

The Employer has requested an administrative-judicial review of the denial of its application and the record has been submitted to the Board for such purpose.

DISCUSSION

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. An employer unlawfully rejects U.S. workers who satisfy the **minimum** requirements of the application and in the advertisement for the position. *See, eg., American Cafe*, 90-INA-26 (Jan. 24, 1991).

The Employer has purportedly rejected applicant Nazif for two reasons, i.e, his lack of familiarity with computer programs and his excessive salary demands. Although Mr. Nazif's resume does not specify familiarity with Excel, the CO is correct in stating that it does show Lotus 123 as part of the "many accounting packages" with which he is familiar. We note that the resume shows also that he had completed a course in computerized accounting and that he uses a computer in his most recent employment spanning a period of 6 years. With such **related** background, Mr. Nazif meets the Employer's minimum alternative requirements and should be able to perform the duties of the position with a nominal period of on-the-job training, if necessary. *See Mindcraft Software, Inc.*, 90-INA-328 (Oct. 2, 1991); *Union Express*, 87-INA-694 (June 28, 1988).

In regard to Mr. Nazif's salary demands, we note that this was not mentioned at the time of his first interview. The Employer's offered salary was noted in the advertisement to which Mr. Nazif responded and it may be assumed reasonably that he was then willing to accept such salary if the position was offered to him at that time. Consequently, the Employer cannot rely on his alleged lack of availability because of increased salary demands at a later date. Furthermore, the Board has held that where an applicant expresses a desire for a higher salary, the employer must actually offer applicant the position and allow the applicant the opportunity to reject the offer. *Kaprielian Enterprises*, 93-INA-193 (Jun. 28, 1994).

As we conclude that Mr. Nazif was rejected for other than lawful, job-related reasons, the issue of Mr. Guirguis's rejection becomes moot.

ORDER

The Certifying Officer's DENIAL of the application for alien labor certification in this case is AFFIRMED.

Entered at the direction of the panel

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a part petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.